The ARIZONA PROSECUTOR

Newsletter of the Arizona Prosecuting Attorneys' Advisory Council

Special points of interest:

- Case Summaries & Recent Rule Amendments
- Goodbye to Bruce
- The Prosecutor Profile
- Happy Holidays
- Upcoming Seminars

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Case Summaries & Recent Rule Amendments

Michigan v. Fisher, __ S.Ct. __, 2009 WL 4544992 (United States Supreme Court, Dec. 7, 2009)

Summary by Diane Gunnels Rowley, APAAC

Fourth Amendment: Warrantless Entry: Exigent Circumstances: Reasonableness: Emergency aid exception to warrant requirement:

- Officers do not need "ironclad proof" of a "likely serious, life-threatening" injury before making a warrantless entry into a dwelling under the "emergency aid" exception to the warrant requirement.
- The exception requires only that circumstances make it objectively reasonable for an officer to believe that someone inside needs medical assistance or that someone is in danger.
- The officer's subjective intent in entering is irrelevant.

State v. Freeney, __ Ariz. __, 2009 WL 4405788 (Arizona Supreme Court, Dec. 4, 2009), *vacating State v. Freeney*, 220 Ariz. 435 (App. 2008)

Summary by Diane Gunnels Rowley, APAAC

Rule 13.5(b), Ariz. R. Crim. P.: Amending an indictment:

- **An amendment to an indictment that changes the elements of an offense changes the nature of the offense and therefore violates Rule 13.5(b), which allows amendment of an indictment "only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment."**
- **However, trial court error in granting an amendment is subject to harmless error review. *Overrules* the "prejudice per se" rule announced in *State v. Sanders*, 205 Ariz. 208 (App. 2003).**

State v. Soliz, __ Ariz. __, 2009 WL 4572926 (Arizona Supreme Court, Dec. 8, 2009)

Summary by Diane Gunnels Rowley, APAAC

Arizona Constitution, Art. 2, § 23: Jury Trial: 12 person jury; Defendant "At Risk" of 30-year Sentence

- Jury Trial: The 12 person jury requirement of Art. 2, § 23 of the Arizona Constitution is NOT violated when, although the law authorizes a sentence of 30 years or more for the crime(s) charged, the case goes to a jury of less

than 12 persons without objection, and the defendant gets less than a 30 year sentence.

- A defendant is not "at risk" of receiving a particular sentence until the case is submitted to the jury.
- Alleged trial error in criminal cases may be reviewed for structural error, harmless error, or fundamental error.

State v. Allen, __ Ariz. __. 4572920 (Arizona Supreme Court, Dec. 8, 2009), *vacating in part State v. Allen*, 220 Ariz. 430 (App. 2008)

Summary by Diane Gunnels Rowley, APAAC

- Change of Plea, Rule 17, Ariz. R. Crim. P.: Unless a defendant actually enters a formal guilty plea to an offense, the trial court need not engage in the colloquy required by *Boykin v. Alabama*, 395 U.S. 238 (1969), or Rule 17. No "tantamount to a guilty plea" standard exists.
- Stipulation to elements of an offense: When defense counsel makes a tactical decision for the defendant to stipulate to elements of an offense, the trial court need not engage in a *Boykin* or Rule 17 colloquy – although it may be "prudent" for the trial judge to confirm on the record that the defendant understands his rights and the consequences of stipulating and agrees with the decision to stipulate.
- Stipulation to elements of an offense: Although stipulations bind the parties, they do not bind the jury, which may accept or reject any stipulated facts.

State v. Noceo, __ Ariz. __, 2009 WL 4807007 (Court of Appeals, Div. 2, Dec. 15, 2009)

Summary by Diane Gunnels Rowley, APAAC

Fourth Amendment: Searches and Seizures; DUI; blood draw:

- The test for lawful searches and seizures is always one of the reasonableness of the search under the circumstances.
- A properly qualified police officer may draw a suspect's blood during a DUI arrest without violating the Fourth Amendment.
- Courts examine the circumstances, means, and procedures involved in a particular blood draw to determine its reasonableness, regardless of expert testimony suggesting general criticisms of the agency's phlebotomy program.

Recent Amendments to Arizona Rules of Criminal Procedure

The Arizona Supreme Court has made numerous changes to the Rules of Criminal Procedure this year. Two of these changes have already taken effect:

R-09-0028 amends Rules 11.5 and 11.6, effective **September 30, 2009**, subject to comments due by May 20, 2010. Amended Rule 11.5(e) states that a court calculating time requirements pursuant to A.R.S. § 13-4514 "shall only consider the time a defendant actually spends in a restoration to competency program." Amended Rule 11.6 corrects statutory references.

R-09-0034: Rule 13.1(c) states that the State's failure to file a timely information is grounds for dismissal of the prosecution on the defense's motion under Rule 16.6(b). **Effective Nov. 10, 2009**, this subsection is amended to correct an erroneous reference to Rule 16.7(b).

The rest of the rule changes will become effective on January 1, 2010. There are a number of rule changes pertaining to courts ordering that defendants be fingerprinted:

FINGERPRINT RULE CHANGES: R-09-0029 amends Rules 3.2, 4.2, 7.5, 14.3, and 26.10, effective January 1, 2010, but these rule changes are subject to comments due by May 20, 2010:

Rule 3.2, as amended, requires courts issuing a summons for a defendant charged with a felony, sex crime, or domestic violence offense to include in the summons a requirement that the defendant provide "ten-print fingerprints" to the appropriate law enforcement agency.

Rule 4.2, as amended, states that at a defendant's initial appearance, if the defendant does not give the court a "completed mandatory fingerprint compliance form," or if the court "has not received the process control number," "the court shall order that within twenty calendar days, the defendant be ten-print fingerprinted at a designated time and place."

Rule 7.5(e), as amended, states that if a defendant fails to timely present the completed mandatory fingerprint compliance form, "or if the court has not received the process control number," the court may on its own motion "remand the defendant into custody for ten-print fingerprinting." If the defendant is otherwise eligible for release, the defendant shall be released after submitting to full fingerprinting.

Rule 14.3(h) states that at arraignment, if the court has not received the defendant's fingerprint form, the court "shall order that" the defendant be fingerprinted within 20 calendar days "at a designated time and place by the appropriate law enforcement agency."

Rule 26.10(b)(5) states that when a court pronounces a defendant's sentence for any felony or certain specified offenses, the court "shall permanently affix the defendant's right index fingerprint to the sentencing document or order."

OTHER RULE CHANGES EFFECTIVE JANUARY 1, 2010:

RULE 1.3, R-09-0025: Rule 1.3, dealing with time computations, is amended to correct references to subsections of the Rules of Civil Procedure.

RULE 1.6, R-06-0016: Rule 1.6 deals with standards for interactive audiovisual proceedings in criminal cases and includes an administrative order establishing such standards.

Amended Rule 1.6(c) says that a defendant may not appear by videoconference at most proceedings unless the court finds extraordinary circumstances and both parties consent. In particular, the new rule states that a defendant may not appear "at any trial, contested probation violation hearing, felony sentencing, or felony probation disposition hearing, except upon the court's finding extraordinary circumstances and with consent of the parties by written stipulation or upon the record."

Amended Rule 1.6(d) states that the court has discretion to require appearance by videoconference for initial appearance, not-guilty plea arraignment, misdemeanor guilty plea, hearings on continu-

ances that do not involve waiving Rule 8 time limits, hearings on uncontested motions, pretrial or status conferences, or informal conferences in post-conviction relief matters. Amended Rule 1.6(e) allows the parties to stipulate to videoconference appearances in other proceedings if the court finds that the defendant has made a knowing, voluntary, and intelligent waiver of the right to be present. Amended Rule 1.6(f) requires the court to reschedule any proceeding to require the defendant to be present in person if the scope of the hearing exceeds the scope of proceedings under Rule 1.6(d) or (e).

RULE 2.3, R-08-0039: The amendment adds Rule 2.3(b), dealing with remote electronic access to court records in cases involving juvenile victims, reading as follows:

> **b.** Upon filing a charging document in a criminal case in which a juvenile is alleged to be the victim of any offense listed in A.R.S Title 13, chapters 14 or 35.1, the prosecuting agency shall advise the clerk that the case is subject to the provisions of Supreme Court Rule 123(g)(1)(C)(ii)(h).

Supreme Court Rule 123 deals with remote electronic access to court records. Rule 123(g)(1)(C)(ii)(h) provides that members of the general public are not allowed electronic access to certain court records that may contain sensitive data, including all documents in cases in which a juvenile is alleged to be the victim of a crime under Title 32, Ch. 14 or Ch. 35.1.

RULE 6.3, R-08-0041: Rule 6.3 is amended to require capital defense counsel to maintain complete case records and records of all aspects of the capital defendant's representation; requiring successor counsel for capital defendants to collect all files and records from prior counsel; and requiring all successor counsel to continue to maintain the case records.

RULE 28.2, R-08-0026: amends Rule 28.2 to provide that, unless the law establishes retention requirements, law enforcement agencies and prosecutors may dispose of "any item, or any part or portion thereof, seized or otherwise obtained for use in a criminal prosecution," in accordance with procedures established by law and rule.

RULE 32.7, R-08-0042: In a capital case, a court must "hold an informal conference within 90 days after the appointment of counsel on the first notice of a petition for post-conviction relief."

RULE 39, R-08-0037: amends Rule 39(a)(1) to state that the word "victim" as used in that rule "is defined in accordance with the definition provided in the Arizona Revised Statutes."

Recent Amendments to the Rules of Evidence

All of these amendments will become effective January 1, 2010.

For prosecutors, the most important of these is the amendment to Rule 804 providing a "forfeiture by wrongdoing" exception to the hearsay rule when the declarant is unavailable and the declarant's statement is offered against a party whose wrongdoing "was intended to, and did, procure the unavailability of the declarant as a witness."

In addition, Rules 703 and 705, dealing with opinion testimony by expert witnesses, were amended. Rule 703 clarifies that an expert may testify based on inadmissible facts or data, so long as the information is of a type reasonably relied upon by experts in the field. The amendment also prohibits the proponent of the expert's testimony from disclosing otherwise-inadmissible information to the jury, unless the court rules that the probative value of the information substantially outweighs its prejudicial effect. Further, Rule 705 is amended to state that, unless a court requires otherwise, an expert may give an opinion or inference without first testifying to the underlying facts or data.

Specific rules:

Rule 408, R-08-0035: Rule 408 is amended to deal with the effect of compromises or offers to compromise a claim. Evidence of negotiations or offers of valuable consideration to compromise a claim are not admissible to prove "liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:" Such evidence may be admissible, however, to show such things as a witness's bias or prejudice, lack of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

New Rule 502, R-09-0004: New Rule 502 deals with disclosure of a communication or information covered by the attorney-client privilege or work product protection. The new rule states that when a disclosure that waives the privilege or protection is made in an Arizona proceeding, the waiver extends to an undisclosed communication or information in an Arizona court proceeding only if (1) the waiver is unintentional, (2) the disclosed and undisclosed communications or information "concern the same subject matter," and (3) the disclosed and undisclosed matters "ought in fairness to be considered together." An *inadvertent* disclosure does not waive the privilege or protection if (1) the disclosure is inadvertent, (2) the holder of the privilege or protection "took reasonable steps to prevent disclosure," and (3) the holder "promptly took reasonable steps to rectify the error." A disclosure that is not the subject of a court's disclosure order and that is made in federal court or in another state's court does not waive the privilege or protection in an Arizona proceeding if (1) the disclosure would not be a waiver if it had occurred in an Arizona court or (2) is not a waiver under federal or foreign state law. A court may order that disclosures connected with a pending proceeding in that court do not waive the privilege/protection, "in which event the disclosure is also not a waiver in any other proceeding." If the parties agree on the effect of disclosure in an Arizona proceeding, that agreement binds only the parties to the agreement, unless the agreement is incorporated into a court order.

Rules 703 and 705, R-08-0036: These rules deal with opinion testimony by experts.

Rule 703 is amended to state specifically that when an expert relies on facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," the expert's opinion or inference may be admitted even though the facts or data on which the expert relies are not themselves admissible in evidence. The amendment also states that the proponent of an opinion or inference shall not disclose "facts or data that are otherwise inadmissible … unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

Rule 705 is amended to state that, unless a court requires otherwise, an expert may give an opinion or inference without first testifying to the underlying facts or data, changing the language from "without prior disclosure" of such facts or data.

Rule 804, R-09-0009: Rule 804 is amended to add a new "forfeiture by wrongdoing" exception to the hearsay rule. New Subsection 804(b)(6) states that when the defendant is unavailable, the hearsay rule does not block the admission of that declarant's statement when the statement is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

Michigan v. Fisher, __ S.Ct. __, 2009 WL 4544992 (United States Supreme Court, Dec. 7, 2009)

Summary by Diane Gunnels Rowley, APAAC

"It was error for the Michigan Court of Appeals to replace [an] objective inquiry into appearances with its hind-sight determination that there was in fact no emergency. It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one encountered here."

Officer G and his partner responded to a complaint of a disturbance and were directed to a residence where a man was "going crazy." They saw a pickup truck with a smashed front in the driveway, damaged fence posts, and three broken house windows with the glass still on the ground outside. They also observed small amounts of blood on and in the truck and on a door to the house. Through a window, they saw Fisher in the house "screaming and throwing things." They knocked and Fisher did not answer. The officers saw that Fisher's hand was cut and asked if he needed medical attention, but he swore at them and told them to get a search warrant. The back door was locked and a couch was pushed across the front door. G pushed the front door partway open and, seeing Fisher pointing a long gun at him, withdrew.

Fisher was charged under Michigan law with assaulting G with a dangerous weapon and possession of a firearm during commission of a felony. He moved to suppress G's statements, arguing that G violated the Fourth Amendment by entering his house without a warrant. The trial court granted the motion to suppress. The Michigan Court of Appeals affirmed the dismissal and the Michigan Supreme Court declined leave to appeal. The State petitioned for certiorari.

The United States Supreme Court granted certiorari and reversed in a *per curiam* opinion, holding that the Michigan Court had misapplied the Fourth Amendment. The entry was justified under the "emergency assistance" exception to the warrant requirement identified in *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), in which the Court held that law enforcement officers may enter a home without a warrant "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." The emergency aid exception does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises; it requires only an **objectively reasonable basis for believing that someone in the home is in need of immediate aid**. The Court compared Fisher's situation with that in *Brigham City* and concluded that G's entry was objectively reasonable. Although G and his partner did not see any punches thrown, "It would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child," or that Fisher would hurt himself "in the course of his rage."

The Michigan Court found that the situation in Fisher's case did not justify the warrantless entry because there did not appear to be any life-threatening injury, noting that Fisher was "very much on his feet and apparently able to see to his own needs." From this, Fisher argued that the officers could not have been motivated by any perceived need for medical help because they never summoned medical help. The Supreme Court rejected this argument, saying that it was objectively reasonable for the officers to enter to assure that Fisher was not endangering anyone else in the house. Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception. Even if G did not subjectively believe that anyone in the house was seriously hurt, the test is not what he believed, but whether there was any objectively reasonable basis for believing that medical assistance was needed or that someone was in danger. The Court stated: It was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight determination that there was in fact no emergency. It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here.

An officer's role includes preventing violence and restoring order. The emergency aid exception applied because it was reasonable for the officers to believe that Fisher was hurt or that he might hurt someone else. Thus, the warrantless entry was justified. The Court reversed and remanded the case to the Michigan courts.

Justice Stevens dissented, joined by J. Sotomayor. Under both federal and Michigan law, the State bears the burden of proof that the warrantless entry was made in a reasonable belief that a person inside was in need of immediate aid. The trial judge heard G testify and found that the evidence showed G had no reasonable basis to enter the house, but was "just acting on some possibilities." Thus, the sole judge that heard G testify was not persuaded that G had "an objectively reasonable basis for believing that entering Fisher's home was necessary to avoid *serious* injury." [Emphasis in original.] The dissent concluded: Today, without having heard [G's] testimony, this Court decides that the trial judge got it wrong. I am not persuaded that he did, but even if we make that assumption, it is hard to see how the Court is justified in micromanaging the day-to-day basis of state tribunals making fact-intensive decisions of this kind. We ought not usurp the role of the fact-finder when faced with a close question of the reasonableness of an officer's action, particularly in a case tried in a state court.

State v. Freeney, __ Ariz. __, 2009 WL 4405788 (Arizona Supreme Court, Dec. 4, 2009), *vacating State v. Freeney*, 220 Ariz. 435 (App. 2008)

Summary by Diane Gunnels Rowley, APAAC

Freeney beat his girlfriend with a metal bar or pipe and threatened to kill her. A neighbor saw and heard this and called the police, but when they arrived, Freeney was gone. The victim had a four-inch laceration on her head and other injuries and told police that Freeney had repeatedly hit her with a metal pipe. She was taken to the hospital for treatment.

"Freeney had notice the State was alleging and intending to prove that the victim had suffered serious physical injury."

A grand jury indicted Freeney and charged him with aggravated assault. The indictment cited §§ 13-1203 and 13-1204 without specifying any subsections, but charged aggravated assault using a deadly weapon or dangerous instrument in violation of A.R.S. § 13-1204(A)(2) and with having intentionally placed the victim in reasonable apprehension of imminent physical injury, § 13-1203 (A)(2). The State alleged that the assault was a dangerous offense involving the use of a dangerous instrument *and/or* the intentional or knowing infliction of serious physical injury on the victim. Also, the State filed an allegation of an aggravating circumstance stating that the offense involved actual or threatened "serious physical injury." In the joint pretrial statement, the State listed the emergency room doctor as a witness and alleged that Freeney hit the victim repeatedly with a metal bar, causing a head injury that required treatment at the hospital.

On the first day of trial, just before jury selection, the State moved to amend the indictment under Rule 13.5, Ariz. R. Crim. P., to change the theory of the offense to "intentionally, knowingly, or recklessly" causing physical injury under § 13-1203 (A)(1) (evidently because a newly-assigned prosecutor learned that the victim had recanted). Freeney objected to the motion to amend as untimely, but conceded that he had received notice of the injuries from police reports, medical records, and photos. The trial court granted the motion to amend over Freeney's objection, finding that the amendment did not prejudice Freeney or violate the notice requirement of the Sixth Amendment. Freeney did not testify at trial, but the victim testified that someone else had assaulted her. The jury found Freeney guilty of aggravated assault, a dangerous offense.

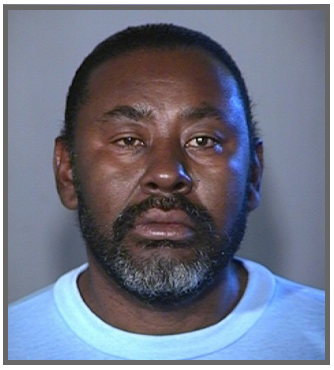
Freeney appealed, contending that the amendment was improper and that the error was prejudicial per se under *State v. Sanders*, 205 Ariz. 208 (App. 2003). *Sanders* held that an aggravated assault committed by "knowingly touching" was a different crime with different elements from one committed by placing a person in reasonable apprehension of injury. Therefore, a mid-trial amendment changing the elements of the offense violated the Sixth Amendment's notice requirement. *Sanders* also held that any amendment changing the nature of the charged offense was prejudicial per se. The Court of Appeals affirmed Freeney's conviction, *State v. Freeney*, 220 Ariz. 435 (App. 2008), distinguishing *Sanders* because the amendment in that case occurred during trial, while Freeney's trial had not yet begun when the court granted the motion to amend the indictment. The Court declined to "impose the prejudice-per-se rule of *Sanders*" and held that, to obtain relief, Freeney had to show actual prejudice, which he failed to do.

The Arizona Supreme Court granted review and affirmed Freeney's conviction, explaining that any amendment to an indictment that changes the nature of the offense violates Rule 13.5(b). That rule's application "hinges on the existence of some mistake or defect in the indictment for which a corrective amendment is needed," such as correcting dates, names, addresses, and typos in section numbers. But Freeney's indictment was not defective – it "simply charged Freeney with an offense the State later determined might be difficult to prove." Thus, the amendment violated Rule 13.5(b).

However, the *Sanders* Court erred by equating a rule violation with a violation of the Sixth Amendment's notice requirement. Sixth Amendment analysis looks beyond the face of the indictment to determine if the defendant actually received constitutionally adequate notice. If not, "he is necessarily and actually prejudiced;" but if the defendant actually received constitutionally adequate notice, there was no prejudice. By contrast, the rule "is limited to the procedural requirements for amending indictments" and "can be violated even when the Sixth Amendment notice requirement has been satisfied," so a violation of Rule 13.5(b) "is neither prejudicial per se nor structural error."

Because Freeney objected to the amendment, the Court reviewed for harmless error, requiring the State to show that the Rule 13.5(b) error was harmless beyond a reasonable doubt. Freeney had actual notice that the State was alleging that the victim suffered serious physical injury because he acknowledged that he had received pretrial disclosures including photos, medical records, and the State's notice of witnesses including the doctor who treated the victim at the hospital. Also, Freeney did not claim that the amendment affected his strategy or trial preparation in any way, and his "all or nothing" defense did not change as a result of the amendment. Thus, the Court found that the State had met its burden of showing that the rule violation was harmless beyond a reasonable doubt. In a footnote, however, the Court "caution[ed] prosecutors and trial courts that Rule 13.5(b) should not be carelessly invoked" and "should be strictly limited to its terms and not used to make substantive changes to the indictment on the assumption that the resulting error will ultimately be found harmless."

The Court then rejected Freeney's claim that allowing the amendment violated the Sixth Amendment because, although the original indictment did not charge him with aggravated assault based on injuring the victim, "he had abundant notice of her injuries – and the State's allegation that he had caused those injuries – from the dangerousness allegation in the indictment, the State's pretrial disclosures, and the joint pretrial statement." He suffered no prejudice, so the Court vacated the Court of Appeals opinion and affirmed Freeney's conviction.



Mark Allen Freeney

State v. Soliz, __ Ariz. __, 2009 WL 4572926 (Arizona Supreme Court, Dec. 8, 2009)

Summary by Diane Gunnels Rowley, APAAC

"When determining whether a sentence of thirty years or more is authorized and thus a twelve-member jury is required under Article 2, Section 23, courts take into account sentencing enhancements, and whether consecutive sentences can be imposed for multiple offenses."

Soliz was charged with selling drugs. The State offered a plea under which he would receive no more than 8 years in prison, but said that if the case went to trial, the State would allege two prior convictions at sentencing, raising the possible maximum sentence to 35 years. Soliz rejected the offer. The case went to trial before only 8 jurors, but neither Soliz nor the State objected or asked for 12 jurors. The jury found Soliz guilty. The State declined to prove priors or aggravating circumstances and requested the presumptive 10-year term, which the court imposed.

On appeal, Soliz argued that he was denied his constitutional right to a 12-person jury. The Court of Appeals reversed in a memorandum decision, holding that failure to empanel a 12-person jury was "fundamental error" requiring reversal, unless the record showed that the State had actually withdrawn its enhancement allegations, thus reducing Soliz's sentencing exposure to less than 30 years.

The State petitioned for review, contending that Soliz did not object to the 8-person jury, under *State v. Henderson*, 210 Ariz. 561 (2005), he bore the burden of proving both fundamental error and prejudice. Soliz argued that *State v. Henley*, 210 Ariz. 561 (2005), held that, even in the absence of any objection by the defendant, failure to provide a 12-person jury for a defendant facing 30 years or more violated Art. 2, § 23 and thus was "fundamental error" and structural error that required the Court to presume prejudice. The State asked the Court to revisit *Henley* in light of *Henderson*.

The Arizona Supreme Court granted review, vacated the Court of Appeals decision, and affirmed the trial court's judgment. The maximum sentence exposure for the crime with which Soliz was charged, plus the State's sentencing enhancement allegations, was 35 years. Thus, if either side had requested 12 jurors, the trial court should have granted that request. However, no one asked for 12 jurors, and the case was tried before and decided by an 8-person jury. Because trial to an 8-person jury "removed any risk of [Soliz's] receiving a sentence of thirty years or more, no constitutional error occurred." A defendant is not "at risk" in terms of the maximum sentence imposable "until the case is submitted to the jury. … Thus, if by the time the case is submitted, a sentence of thirty years or more is no longer 'authorized by law,'" Art. 2, § 23 does not require 12 jurors. By letting the case go to an 8-person jury, the State effectively waived its ability to obtain a sentence of 30 years or more. "In such a circumstance, as long as a lesser sentence may legally be imposed for the crime alleged, we hold that a sentence of thirty years or more is no longer permitted," so Art. 2, § 22's 12-person requirement is not triggered.

The Court recognized that its decision departed from *Henley* and *State v. Pope*, 192 Ariz. 119 (App. 1998). *Pope* held that a defendant could not be deprived of a 12-person jury by the judge's assurance that any sentence imposed would be less than 30 years. The Court said that *Henley* led to "anomalous results." Under *Henley*'s automatic reversal rule, defense counsel had no incentive to request a jury of 12, but rather could wait to see what the 8-person jury did, "knowing that a retrial would always result" if the defendant faced 30 years or more. Further, when a defendant successfully appeals, the State usually cannot seek a sentence longer than that initially imposed, so a remand after a *Henley* reversal would require an 8-person jury. The Court concluded that its decision avoided anomalous results while still protecting defendants from receiving long sentences unless a jury of 12 is used.

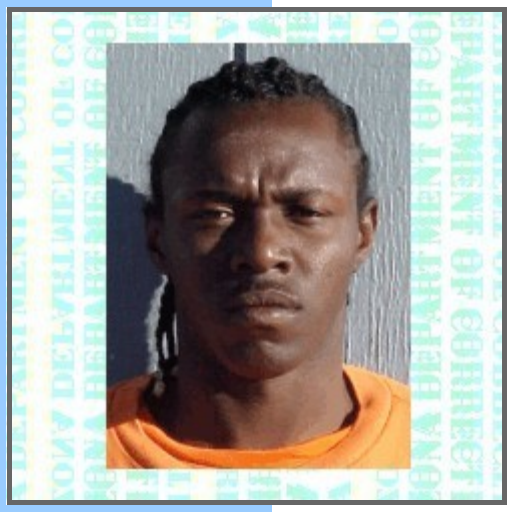
State v. Allen, __ Ariz. __. 4572920 (Arizona Supreme Court, Dec. 8, 2009), *vacating in part State v. Allen*, 220 Ariz. 430 (App. 2008)

Summary by Diane Gunnels Rowley, APAAC

"In the absence of a guilty or no-contest plea or a stipulation to a prior conviction, nothing in Rule 17 requires a trial court to engage a stipulating defendant in a formal plea colloquy."

Undercover police saw Allen carrying a gun, chasing a woman who was screaming for help. They pursued him and saw Allen standing over the kneeling woman, holding a gun to her head. When they appeared, announced themselves, and drew their guns, Allen fled. The woman identified herself as Allen's mother. Other officers chased Allen, saw him throw something in a dumpster, and heard a metallic noise. They caught him and found a .38 revolver in the dumpster and marijuana and .38 caliber bullets on him. Allen admitted carrying the gun and chasing his mother, but denied pointing the gun at her. He also admitted knowing he was a prohibited possessor and admitted the marijuana was his.

Allen went to trial on aggravated assault, disorderly conduct, weapons misconduct, and marijuana possession. On the second day of trial, the parties asked the judge to read stipulations to the jury, stating that both the defendant and State agreed to stipulate that (1) Allen was a prohibited possessor and (2) he possessed a usable amount of marijuana. The judge did so and the jury found Allen guilty of all four counts, but the judge dismissed the disorderly conduct charge "as subsumed in the aggravated assault verdict." Allen then admitted two prior felony convictions and the court sentenced him to concurrent prison terms totaling ten years.



Jermahal L. Allen

The Court of Appeals affirmed Allen's convictions and sentences for the assault and weapons charges but remanded the marijuana conviction and sentence. *State v. Allen*, 220 Ariz. 430 (App. 2008). The Court recognized that Allen was bound by defense counsel's tactical decisions absent "exceptional circumstances." Because counsel had decided to stipulate to his prohibited possessor status to keep the jury from finding out *why* he had that status, no exceptional circumstances existed and therefore no colloquy was required. However, the Court of Appeals "could think of no strategic reason for stipulating to two out of three elements of the marijuana offense and not contesting the third," so it concluded that Allen's stipulation on the marijuana charge was the "functional equivalent of a guilty plea." Therefore, the Court held that the trial court should have engaged Allen in a Rule 17-type colloquy" to insure that his stipulation was voluntarily and intelligently made and that the court's failure to do so constituted fundamental error. The Court of Appeals remanded the case for the trial court to determine whether lack of a colloquy prejudiced Allen.

The State petitioned for review. The Arizona Supreme Court granted review, granted relief, and vacated the Court of Appeals decision in part. Courts encourage parties to stipulate to "easily proven facts" to "narrow issues" and "promote judicial economy." While stipulations bind the parties and relieve them of the burden of establishing the stipulated facts, "stipulations do not bind the jury, and jurors may accept or reject them."

Although Allen acknowledged that he did not plead guilty, he argued that because he stipulated to two out of three elements of the marijuana offense – possession and "usable quantity" – and did not contest that his possession was "knowing," "his stipulation was the practical equivalent of a guilty plea" triggering *Boykin* and Rule 17 colloquy requirements. The Arizona Supreme Court rejected this argument, saying that stipulations of facts in not guilty pleas are not equivalent to guilty pleas for *Boykin* purposes: "The constitution does not compel a full *Boykin* colloquy in the absence of a formal guilty plea." The Court noted that in the past, Arizona cases extended the *Boykin* requirement to stipulations that were "tantamount to a guilty plea," but the Court explicitly rejected that standard as unworkable in *State v. Avila*, 127 Ariz. 21 (1980). When a defendant stipulates to some but not all the elements of a charge, the trial court will not know whether the defendant intends to contest the remaining elements. Also, the "tantamount to a guilty plea" standard gave the defendant an unfair advantage, allowing him to essentially plead guilty, yet retain rights typically waived by entering a guilty plea, such as challenging searches. The standard might also require "interruptions in trial to ascertain whether warnings are required and, if so, to give them." The Court again explicitly rejected the "'tantamount to' or 'functional equivalent of' a guilty plea standard."

Rules 17.1 through 17.4 require a judge to advise a defendant in open court of the consequences of a guilty or no contest plea and ensure that the defendant wants to give up his constitutional rights; Rule 17.6 requires the court to determine whether an admission of a prior conviction is knowing and voluntary. *State v. Morales*, 215 Ariz. 59 (2007). Allen argued that because Rule 17.6 requires a plea colloquy for "stipulations to prior convictions, which are like elements of a crime," the court "should similarly require a colloquy whenever a defendant stipulates to facts that constitute elements of a crime." The Court rejected this argument, noting that *Morales* was grounded in Rule 17.6's language and related solely to prior convictions. The Court concluded, "In the absence of a guilty or no-contest plea or a stipulation to a prior conviction, nothing in Rule 17 requires a trial court to engage a stipulating defendant in a formal plea colloquy. Although a prudent trial judge may opt to confirm on the record that the defendant understands the consequences of the stipulation, recognizes the constitutional rights he will forgo, and agrees with the decision to stipulate, neither *Boykin* nor [Rule 17] compels a colloquy."

The State contended that Allen's claim was, in effect, an ineffective assistance of counsel claim that should have been raised in a post-conviction relief proceeding under Rule 32, Ariz. R. Crim. P., rather than on direct appeal. The Court disagreed that Allen was raising an ineffective assistance claim in this case, but noted that such claims should be raised under Rule 32.

"The fundamental question with respect to compelled blood draws and the Fourth Amendment . . . is not whether the blood draw program as a whole is reasonable-a question our state legislature implicitly has answered in A.R.S. §§ 28-1321 and 28-1388-but rather, 'whether the means and procedures employed in taking [a suspect's] blood respected relevant Fourth Amendment standards of reasonableness.'"

***State v. Noceo*, __ Ariz. __, 2009 WL 4807007 (Court of Appeals, Div. 2, Dec. 15, 2009)**
Summary by Diane Gunnels Rowley, APAAC

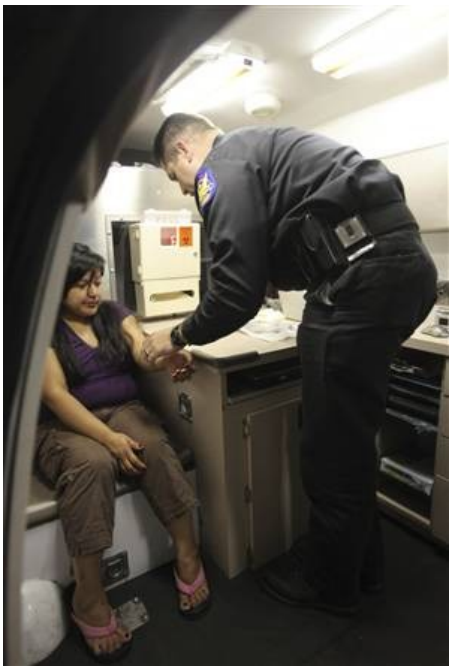
In 2007, Noceo and Harris were separately arrested and charged with DUI. Qualified phlebotomist DPS officers successfully drew blood from each man while he was seated in a police car at the scene of his arrest. In Noceo's case, the lighting was poor, so the officer turned on the car's dome light and had another officer hold a flashlight on Noceo's arm. The officer successfully drew Noceo's blood on the first try, and Noceo fell asleep during the process.

Noceo and Harris moved to suppress the blood test results, arguing that their blood was drawn unconstitutionally. Noceo's judge granted his motion and the State appealed. Harris's judge denied his motion, Harris was tried and convicted in Tuscon City Court, and the superior court affirmed his conviction. Harris petitioned for special action review. The Court of Appeals accepted jurisdiction and consolidated the cases for review. The Court reviews a trial court's ruling on a suppression motion for abuse of discretion, based only on the evidence presented at the suppression hearing, and defers to the trial court's findings of fact unless they are clearly erroneous, but reviews questions of law de novo.

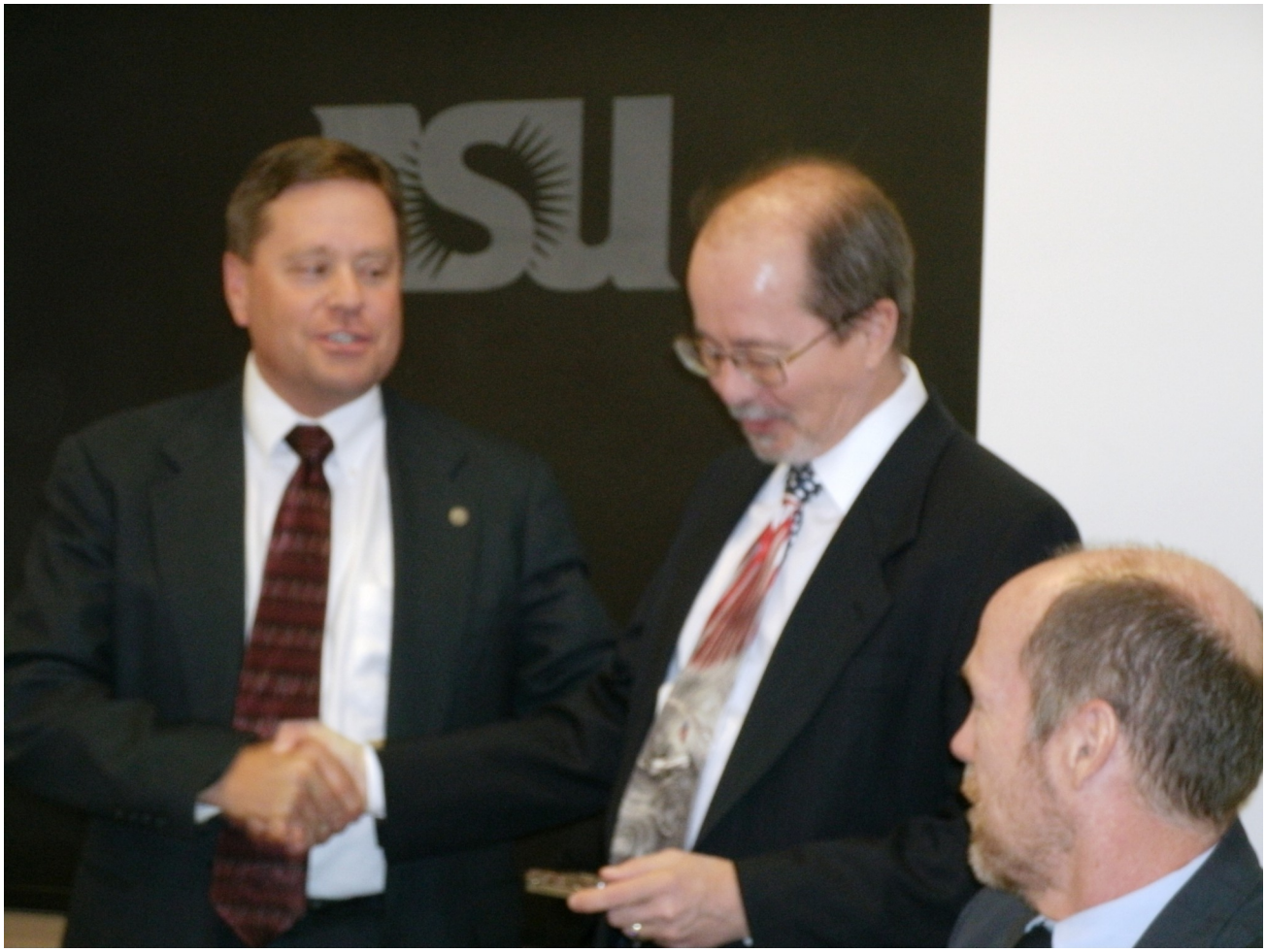
Noceo argued that the blood draw in his case violated the Fourth Amendment, but the Court disagreed, stating that under *State v. May*, 210 Ariz. 452 (App. 2005), a properly qualified police officer may draw blood during a DUI arrest without violating the Fourth Amendment. The facts here case were like those in *May*, but the trial court here suppressed the blood test results "based on its findings regarding the phlebotomy program as a whole rather than the circumstances of Noceo's blood draw in particular." But the issue in compelled blood draws "is not whether the program as a whole is reasonable – a question our state legislature implicitly has answered in A.R.S. §§ 28-1321 and 28-1388 – but rather, 'whether the means and procedures employed in taking [a suspect's] blood respected relevant Fourth Amendment standards of reasonableness.'" *Noceo*, *quoting Schmerber v. California*, 348 U.S. 757, 768 (1966).

The Court found that the record did not support the trial court's three factual findings – first, that the phlebotomy program "lacked appropriate medical oversight when originated." This finding was erroneous because the record showed that the program originated under direction of EMTs and other trained personnel and a medical doctor had reviewed the manual and overseen the entire program at its inception. Second, the trial court found that poor lighting conditions and unsanitary conditions in field blood draws created "an unreasonable risk of infection and injury." But not even Noceo's experts contended that poor lighting made a blood draw unacceptable, saying only that drawing blood in suboptimal conditions should be avoided if possible. As for infection and injury issues, the officer testified that proper sanitary procedures were used and confirmed that Noceo was seated when his blood was drawn. Third, the trial court found that there was no "realistic mechanism to evaluate continued proficiency" and that this lack endangered the suspects, but the evidence showed that officers had to participate in continued training and evaluation. The Court of Appeals concluded that the trial court had made "erroneous findings not supported by the evidence" or by *Schmerber*.

Finally, the Court held that the trial court's "generalized legal conclusions" about the DPS In *May*, a phlebotomist officer drew blood while the defendant stood behind a police car with his arm resting on the trunk. A defense expert testified that persons should be seated for blood draws because drawing blood from a standing person increases the risk of injury. The officer testified about his training and experience and stated that he had drawn blood 150 to 200 times. The trial court denied the motion to suppress, finding the blood draw reasonable because the standing blood draw procedure used posed only a "slightly higher" risk than the preferred seated blood draw. The Court of Appeals agreed, saying that the record showed no constitutional or statutory basis for reversing the trial court's finding that the standing blood draw procedure used was reasonable.



APAAC says Farewell to Chief Counsel, Bruce W. Bowers



At the December council meeting, APAAC Chairman/Greenlee County Attorney, Derek Rapier (left) and APAAC Executive Director, Paul Ahler (right), thanked Bruce Bowers for his thirty years of outstanding service to APAAC.

Chief Counsel, Bruce Bowers, will retire in January after thirty years with APAAC. Bruce was instrumental in creating the vast array of continuing legal education programs offered by APAAC. Additionally, Bruce regularly provided research support to prosecutors statewide. Bruce's legacy can be seen throughout Arizona, with the high-quality prosecutors who learned their basic trial skills by way of his training programs and then stretched their skills with his more advance legal seminars.

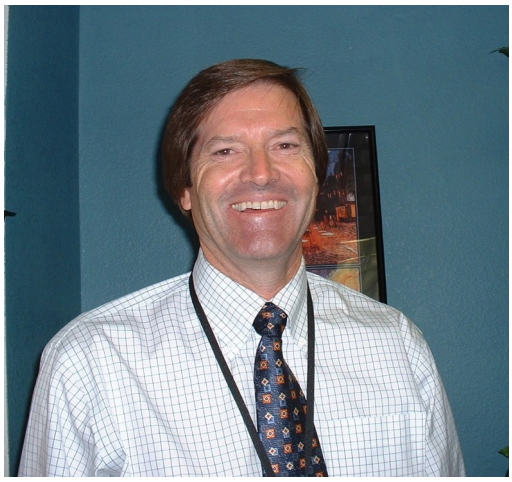
Bruce's extraordinary work and dedication was recognized at the December council meeting. Greenlee County Attorney, Derek Rapier, who is the Chairman of the APAAC Council, thanked Bruce for his enumerable contributions to the organization. Our Executive Director, Paul Ahler, praised Bruce for his professionalism, dedication, and hard work.

Please join us in wishing Bruce the very best in his retirement, and thanking him for his tireless efforts to provide all Arizona prosecutors with the highest quality continuing legal education.

PROSECUTOR PROFILE

Deputy Pima County Attorney Rick Unklesbay has had a long and distinguished career as an Arizona Prosecutor

Before law school at the University of Arizona, Rick Unklesbay entertained the idea of becoming a teacher – it was his fallback plan in case he was not accepted into law school. Fortunately, for the citizens of Pima County he was accepted into law school. His career as a prosecutor began in mis-



demeanors with the City of Phoenix. In July 1981, he became a prosecutor at the Pima County Attorney's Office in Tucson, where he has become one of the finest prosecutors in Arizona. Rick has worked in all areas of felony prosecution, supervised various felony teams, and taught and mentored other prosecutors. Currently, he is Chief Trial Counsel and Supervisor of the Homicide/Cold Case Unit in the Criminal Division, where he prosecutes the most serious felons – those who commit brutal and horrific murders. These cases often involve the possibility of the death penalty.

The list of cases Rick has prosecuted is long. He has tried more than 200 felony jury trials and well over 100 murder cases. He prosecutes predators who target the innocent and helps remove them from the community. He has secured justice for many, but because of the nature of the cases he prosecutes, there are long-lasting residual effects and pitfalls that challenge victims as they seek to get on with their lives. You may not see it in his demeanor, but he knows the pain of victims and their families. In a small town like Tucson, he occasionally runs into the victims and their families, and when that happens, these meetings are bittersweet – bringing back a flood of painful memories for both victim and prosecutor.

The plight of victims weighs heavily on his mind, such as the case involving a young woman with a six-month old baby, who was living with her parents. She was murdered by the baby's father. Rick prosecuted the case and obtained a conviction. Over the years he would see the woman's parents who raised the infant; Rick has seen him grow into young manhood. Although he finds it incredibly sad that the young man had to grow up without a mother, he is extremely pleased to have been a part of the young man's life and instrumental in providing justice for the family.

Rick has prosecuted numerous cases where the death penalty was requested. He is the designated speaker for the Pima County Attorney's Office at media and public forums on the death penalty and served on the Arizona Attorney General's Capital Case Commission.

In one noteworthy case, *State v. Prasertphong and Huerstel,* Rick encountered many challenges prosecuting two defendants who robbed a Pizza Hut restaurant in 1999 and who, during the commission of the robbery, executed three restaurant employees in a particularly cold and calculating manner. The trial was moved out of Pima County because of pretrial publicity.

Rick had to live away from home during the trial. In a dual jury trial, with five defense attorneys, the families of the victims spent six weeks with Rick in Prescott, Arizona. Day after day after day the victims' families sat in court watching defense attorneys try to get the murderers acquitted. In addition, the prosecution had to contend with Amnesty International which actively campaigned for leniency for the defendants as Huerstel was 17 at the time of the slayings, while Prasertphong, 19, was a dual Thai/U.S. national, whose foreign consulate had not been informed of his arrest. Amnesty International received numerous letters of support on behalf of the killers and opposing the death penalty. After a lengthy trial plus aggravation and mitigation hearings, both defendants were convicted and sentenced to death. Huerstel's convictions were overturned and later, the defendant entered a plea in October 2005. Prosecutors, after *Ring*, withdrew death on Prasertphong, who was sentenced to natural life in prison.

Rick was the first prosecutor in southern Arizona to conduct re-sentencing trials of death row inmates after the U.S. Supreme Court's 2002 landmark decision in *Ring* ruled that juries, not judges, must make life or death determinations about the fate of convicted killers and that sentences imposed by a judge violate a defendant's Sixth Amendment constitutional right to a trial by jury. Arizona was one of the states in which a number of murderers could possibly have their death sentences commuted to life imprisonment or face re-trial. Re-sentencing cases are especially grueling for the victims and their families; the entire trial process must be repeated, and the families must endure the horror

again – re-living the anguish of the murders.

Scott Nordstrom was convicted for the 1996 murders of six people, and in 1998 a Pima County Judge sentenced Nordstrom to death for the senseless and brutal murders of the six victims. Because of the 2002 *Ring* ruling, Nordstrom had to be re-prosecuted in front of a jury. In September 2009, Rick's prosecution prevailed, and Nordstrom was once more sentenced to death.

The most difficult cases for Rick are those that involve parents left behind to deal with heartache and the overwhelming loss of a murdered child; a parent should not have to bury a child. Rick recently concluded a 25-year old murder case in which the family's two children were murdered. The case had a long history, and even after 25 years, as family members gave their emotionally-charged impact statement to the jury, jurors cried along with the family, as if the loss happened yesterday.

Obviously, Rick and Barbara are not getting ready for trial

Rick is a man of quiet strength. He is calm and methodical in his work, soft-spoken, polite and tireless, a thoughtful, solid, well-grounded prosecutor, an inspiring leader, and a role model. These qualities have consistently stood out in his years as a prosecutor, and they were celebrated in 2000 with his promotion to Chief Criminal Deputy. After three years, he stepped down from that position, having found that administrative duties associated with the position took him away from what he loved – the courtroom. Since 2003, Rick has been Chief Trial Counsel for the Pima County Attorney's Office.

To handle the incredible stress associated with his job, Rick does what millions of Americans do – he runs; he and his wife Margie are avid runners and every year they run in a number of races and help raise money for various causes. Rick's life is centered on his family – he is a devoted family man and great dad to two beautiful daughters, so devoted that when they were little girls he read all seven *Harry Potter* books aloud to them.

In October of this year, Rick was inducted as a Fellow into the *American College of Trial Lawyers*, one of the premier legal associations in America. While he is extremely honored to be associated with this organization, it is his compassion for victims and his love of the courtroom that drive him. In thirty years as a prosecutor, he has devoted his time, talents, and skills to pursuing justice, prosecuting criminals, consoling victims, and protecting the community. Although emotionally demanding, Rick finds it profoundly satisfying to provide justice and bring comfort to victims and their families.

Rick and his wife Margie

HAPPY HOLIDAYS FROM ALL OF US HERE AT APAAC

We look forward to working with all of you next year!

APAAC

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We're on the web!
http://apaac.az.gov

APAAC's Upcoming Seminars

Basic Advocacy/Introduction to Prosecution Course - January 11-15, 2010
Criminal Year in Review - Tucson - March 12, 2010
Criminal Year in Review - Phoenix - March 19, 2010 (tentative)
Criminal Year in Review - Mesa - March 26, 2010
Intermediate Advocacy Course - June 7-10, 2010

All Upcoming NDAA Seminars

http://ndaa.org

January

Prosecutor Bootcamp - January 11-15, 2010 - NAC
Courtroom Technology - January 26-29, 2010 - NAC

February

Investigation and Prosecution of Child Fatalities and Physical Abuse - February 1-5, 2010 - Santa Fe, NM
Trial Advocacy I - February 1-5, 2010 - NAC
Prosecutor Bootcamp - February 8-12, 2010 - NAC
Prosecuting Drug Cases - February 21-25, 2010 - Memphis, TN
Childproof - February 21-26, 2010 - NAC
Cybersleuth I - February 22-26, 2010
National Institute for the Prosecution of Domestic Violence:
Specialized DV Prosecutors & Co-located Prosecutors - February 23-26, 2010 - New Orleans, LA

March

Unsafe Havens II - March 1-5, 2010 - NAC
Prosecuting Homicide Cases - March 7-11, 2010 - Orlando, FL
Trial Advocacy I - March 15-19, 2010 - NAC
Trial Advocacy II - March 22-26, 2010 - NAC
Cross-Examination - March 29 - April 1, 2010 - NAC